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No. 02-1315

In the

Supreme Court of the United States

GARY LOCKE,
GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE TERESA M. BECKER IN SUPPORT OF RESPONDENT

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether a state policy stripping students of scholarship funds based upon an arbitrary and irrebuttable presumption, resulting in an arbitrary and capricious classification of citizens for the purpose of allocating a government benefit, and creating a civil disability penalizing only those students who wish to exercise their fundamental right to the Free Exercise of Religion, Free Speech, and Association for the purpose of discussion concerning religion conducted from a religious viewpoint deemed anathema by the State of Washington, violates the First Amendment of the United States Constitution as incorporated via the Fourteenth Amendment.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus curiae, Teresa M. Becker, is a senior at Ave Maria College, a four year Liberal Arts institution, located in Ypsilanti, Michigan. Like Joshua Davey, Teresa received a state scholarship, Michigan's Competitive Scholarship.[2] Like Washington's Promise Scholarship, Michigan's Competitive scholarship is made available to students based on academic achievement and financial need. Like Joshua Davey, Teresa believes that she is called to study theology as part of her vocation–her calling to know, love, and serve God (and her fellow man); but she does not believe that she is called to life as a religious within the Roman Catholic Church to which she adheres as a result of her religious conviction.

As a result of her sincerely held religious conviction Teresa, like Joshua Davey, selected Theology as her undergraduate major. Upon learning that Teresa had selected Theology as her undergraduate major, the State of Michigan stripped Teresa of her Competitive Scholarship in much the same way that the State of Washington has stripped Joshua Davey of his Promise Scholarship. By its terms, the statute creating

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[1]Pursuant to Rule 37, Teresa gratefully acknowledges both Petitioner and Respondent, both of whom have kindly consented to the filing of her amicus brief. Pursuant to Rule 37.6 Teresa indicates that no party authored any part of this brief and that no person has provided any monetary support for this brief apart from those identified therein.

[2]The facts relative to Teresa's interests are matters of public record by reason of the pleadings and other papers filed in connection with her suit pending in the United States District Court for the Eastern District of Michigan, Becker v. Granhom et al., Case No. 03-CV-70429, the Hon. George Caram Steeh presiding.

Michigan's Competitive Scholarship protects students from discrimination based upon their chosen course of study but strips students of this protection (and their scholarship) if they enrolled in a course of study leading to a degree in theology, divinity, or religious education. More specifically, Michigan's law provides:

> An applicant awarded a first-year scholarship or a renewal scholarship shall not be restricted in the choice of the course of study he or she wishes to pursue, except that a scholarship award shall not be made to a student enrolled in a program of study leading to a degree in theology, divinity, or religious education.

MCL 390.977. As a result of this provision Teresa, like Joshua Davey, was stripped of a valuable government benefit made available to citizens for the purpose of facilitating their private choice in course of study simply because the promptings of her conscience led her to enroll in a course of study leading to a degree in theology, a discipline deemed anathema by the State of Michigan.

Teresa brought suit in the United States District Court for the Eastern District of Michigan seeking a preliminary injunction enjoining the defendants from stripping her of her Competitive Scholarship. *See Becker v. Granholm et al.*, Case No. 03-CV-70429. By order dated July 21, 2003, the Honorable George Caram Steeh, United States District Court Judge for the Eastern District of Michigan, entered an order enjoining the defendants in that suit from depriving Teresa of her Competitive Scholarship because she chose Theology as

her undergraduate major.[1] But the court did not grant Teresa's request for an order requiring the defendants to pay the competitive scholarship funds she was entitled to for her Junior year; instead, the court ordered the defendants to escrow the funds due to Teresa for the 2002-03 academic and fiscal year ending September 30, 2003 pending this Court's decision in this case. By stipulated order the defendants agreed to escrow funds equal to the amount of the Competitive Scholarship Teresa would receive for the 2002-03 academic and fiscal year pending this Court's decision.

Teresa has an intense and personal interest in the proper resolution of this dispute because Judge Steeh has indicated his opinion that her claims rise or fall with Joshua Davey's claims. In his order granting her motion for preliminary injunction, Judge Steeh indicated that he regards Teresa's Free Exercise claim as akin to Davey's claim, although Teresa does not believe she is called to life as a religious in the Roman Catholic Church. See 2003 WL 21714071 at p. 2. In addition, Judge Steeh has stated his opinion that if Joshua Davey's Free Exercise claim fails, then Teresa is not likely to prevail on the merits of the claims she advances under the Free Speech and Equal Protection clauses. *Id* at p. 6 n. 1. Teresa respectfully files this amicus because she believes that both she and Joshua Davey have been subject to invidious discrimination that plainly violates their right to the Free Exercise of Religion, Free Speech, and Equal Protection.

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[1] Judge Steeh's order can be found at 2003 WL 21714071 (July 21, 2003).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Washington's decision to strip Joshua Davey of his Promise Scholarship because he chose to study theology *via* courses taught from a religious perspective consistent with his religious conviction cannot withstand even the most deferential standard of review, never mind the strict scrutiny required in this case. The State's policy, which strips students like Joshua of Promise Scholarships if they choose to major in theology taught from a non-secular perspective, rests upon an arbitrary and irrebuttable presumption that scholarship monies that can be applied to a wide variety of purely secular costs incurred in connection with college instruction will be used to pay the costs of the theology courses deemed anathema by the State of Washington. This arbitrary and irrebuttable presumption, in turn, provides the basis for a wholly arbitrary and capricious classification of citizens based on "declared major" that has nothing to do with the actual use of Promise Scholarship funds. And precisely because Washington's policy is so plainly arbitrary and capricious, the result of that policy is to make eligibility for its Promise Scholarship turn on an unconstitutional condition; the policy creates an illicit *quid pro quo* whereby students who wish to receive Washington's Promise Scholarship must foreswear a course of study chosen as a result of private choice and sincerely held religious conviction. For these related reasons, among others, the Ninth Circuit's decision should be affirmed.[1]

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[1]Becker believes that Washington's policy violates Davey's right to Free Exercise, Free Speech, and Equal Protection for the reasons stated by Davey, among others. Consistent with her role as amicus she will not reiterate the arguments advanced by Joshua but only highlights a few of the wholly arbitrary and capricious means that the State of Washington has employed in connection with its decision to strip Joshua of his Promise Scholarship.

ARGUMENT

Washington's decision to strip Joshua Davey of his Promise Scholarship because he chose to major in theology and receive instruction *via* courses taught from a religious perspective consistent with his religious conviction violates at least three well established lines of this Court's jurisprudence in addition to those that Davey has primarily relied upon. First, Washington's policy violates two parallel lines of cases, developed under the Due Process and Equal Protection clauses, which recognize that classifications based on gross generalizations, conclusive presumptions, or arbitrary preferences are void. Second, this Court has consistently voided restrictions which make eligibility for government benefits turn on the sacrifice of fundamental rights. Taken together these lines of authority demonstrate that Washington's policy is unlawful such that the decision of the United States Court of Appeals, Ninth Circuit, should be affirmed.

I. Washington's Policy Barring Receipt of Promise Scholarships by Students Majoring in Theology Taught from a Religious Viewpoint Deemed Anathema by the State Violates Due Process and Equal Protection.

Washington's decision to strip Joshua Davey of his Promise Scholarship because he chose to study theology *via* courses that Washington does not deem sufficiently secular violates both Due Process and Equal Protection even under the most deferential standard of review. In this case, there is no question that the

Promise Scholarship can be used to pay a wide variety of legitimate and purely secular expenses typically incurred in connection with college study including tuition, room and board, books and materials, and transportion. See 1999 Wash. Laws ch. 309, §611(6)(i)(vii). Likewise, there is no dispute that Joshua Davey had a double major in Pastoral Ministries and Business Management/Administration. JA 43. The State of Washington awarded a total of $2,667 to Joshua in connection with his first two years of college. JA 55, 76, 95, 175, 178, 185.

Joshua was stripped of his Promise Scholarship because he chose to major in Pastoral Ministries. JA 77 pursuant to Wash.Rev. Code §28B.10.814 & §28B.119.010(8). As interpreted and applied by Washington, these statutes strip students like Joshua of their Promise Scholarships if they choose to major in theology *via* courses the State deems anthema because they are taught from a religious viewpoint or, put another way, a viewpoint that the State does not deem sufficiently secular. See Pet. Br. At 6. (law disqualifies student studying theology only where subject is tuaght from a perspective that is "devotional in nature or designed to induce religious faith."). Washington attempts to defend this gross discrimination against students who wish to study theology from a viewpoint consistent with their religious conviction on the grounds that the State has chosen to fund secular–but not religious–instruction. See Pet. Br. at p. i (Question Presented).

A. Washington's Policy Rests upon an Arbitrary and Irrebuttable Presumption That Violates Due Process.

Washington's effort to defend its gross discrimination against students who wish to study theology from a viewpoint consistent with their religious conviction on the grounds that the State has chosen to fund secular–but not religious–instruction is wholly untenable. For it is immediately apparent that Washington's policy rests upon nothing more than a wholly arbitrary presumption that the State employs as an accounting convention. More specifically, Washington has chosen to presume that the few thousand dollars Joshua Davey was entitled to receive *via* a Promise Scholarship would be spent upon the very sort of instruction the State will not allow the funds to pay for–as opposed to the countless secular expenses that Davey incurred in connection with his college study, such as room and board, transportation, or the costs of books or tuition incurred to pay for instruction in courses that have nothing to do with theology taught from a viewpoint.

There is no basis for this perverse presumption that Promise Scholarship funds will be used for proscribed purposes in reason or justice. Quite the contrary, the perverse presumption that Washington has chosen to employ in the administration of its Promise Scholarship program is wholly arbitrary and capricious, presuming that students like Davey will gratuitously apply funds in a manner forbidden by state law as opposed to using those funds for lawful purposes that advance the student's goal of securing a college degree.

The wholly arbitrary and capricious nature of the presumption that Washington employs in connection with its administration of Washington's Promise Scholarship is all the more egregious because it is an irrebuttable presumption. As noted above, Promise Scholarship funds can be used to pay for any number of permissible secular expenses inevitably incurred in connection with securing a college degree. In this case, moreover, Davey had a double-major such that Promise Scholarship funds could be used to pay for instruction in his Business Management/Administration major, one that the State of Washington finds less offensive if only because it is secular. Indeed, Washington concedes that Davey could have used these funds to pay for his Business Management/Administration degree if he were pursuing that course of study at another institution where he was not seeking a degree in theology. See Pet. Br. at 12, 20, 24-25, 38-39. Nonetheless, Davey was stripped of his Promise Scholarship because he has a double major at one school.

Washington's acknowledgment that Davey could use Promise Scholarship funds to pay for his secular Business Management/Administration major if he were pursuing that course of instruction at another institution where he was not pursuing a degree in Theology highlights the arbitrary and irrebuttable presumption it has employed in the administration of its Promise Scholarship. For that concession demonstrates that Davey has been stripped of his Promise Scholarship simply because Washington presumes that if Promise Scholarship funds pass to a institution where a student is receiving instruction in theology, then those funds are used to pay for theology course. There is no basis for this perverse presumption in logic or justice. Indeed, the formalistic means that State would have Davey to employ in order to avoid its perverse and irrebuttable

presumption (i.e. enroll in two different colleges at the same time) speak volumes insofar as they belie Washington's claimed interest and demonstrate the wholly arbitrary nature of its policy.

Washington's policy is wholly inconsistent with this Court's decisions voiding arbitrary and capricious classifications that burden a group of citizens based on gross generalizations or conclusive presumptions. *See e.g. Romer v. Evans*, 517 U.S. 620 (1996)(Amendment which placed homosexuals in a solitary class with respect to transactions and relations in both the private and governmental sphere violated equal protection because it imposed a broad and undifferentiated disability on a single named group amounting to a special disability upon that group alone); *Cleveland Board of Ed v. LaFluer*, 414 U.S. 632 (1974)(Regulations requiring teachers to take leave four to five months before due date of child violated due process because arbitrary periods did not consistently serve to ensure stated goal of preserving continuity in instruction and swept too broadly by creating a conclusive presumption that teacher would not be fit to teach; requirement of three month delay before return to work after birth violated due process because it created an irrebuttable presumption that mother was not fit to return to work); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)(Zoning ordinance which barred grandchild from living with the grandmother while allowing other relatives to live together was an arbitrary interference with family life); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)(City ordinance requiring special use permit for proposed group home for mentally retarded but not other similarly situated uses violated equal protection given lack of rational basis for stated belief that group home posed special threat to legitimate interests).

In each of these cases, this Court recognized that policies limiting individual liberty or property interests based on nothing more than arbitrary assumptions and effectively irrebuttable presumptions violate Due Process or Equal Protection. Significantly, these decisions did not entail any heightened standard of review. The challenged regulation failed precisely because it rested on an arbitrary generalization or a presumption that was effectively irrebuttable.

Washington's policy for administration of the Promise Scholarship, which rests upon a perverse and irrebuttable presumption that students will use Promise Scholarship funds for an illicit purpose (i.e. to pay for theology courses taught from a religious perspective) as opposed to a lawful purpose (i.e. to pay for many other legitimate expenses) offends Due Process precisely because it is perverse, irrational, and irrebuttable. For this reason alone the Ninth Circuit's decision should be affirmed.

B. Washington's Policy Also Violates Equal Protection Because it Employs an Arbitrary and Capricious Classification of Citizens for the Purpose of Allocating a Government Benefit.

Washington's policy also results in a wholly arbitrary classification of citizens for the purpose of receiving this benefit. Washington frankly concedes the facts that highlight this wholly arbitrary and capricious classification of students for the purpose of determining their continued eligibility for Promise Scholarships. One the one hand, Washington seeks to justify its policy on the grounds that the State does not want Promise Scholarship funds to fund religious instruction. See Pet.

Br. at p. I (Question Presented). On the other hand, Washington concedes that a student would receive a Promise Scholarship even if that student were enrolled in courses teaching theology from a religious perspective–so long as the student does not declare a major in theology taught from a religious perspective. Pet. at 17.

Washington's concessions conclusively demonstrate that its policy turns on an absolutely arbitrary and capricious classification that has nothing to do with its stated concern i.e. the use of public funds to pay for religious instruction but, instead, hinges solely on a purely formal inquiry: whether a student has declared a Theology major. Here again the results of Washington's policy offend reason and justice. On the one hand, Joshua Davey cannot use Promise Scholarship funds to pay for secular instruction received in connection with his Business Management/Administration major because he also declared a major in Theology. On the other hand, Joshua's classmates in the Business Management/Administration can use Promise Scholarship funds to pay for the very theology courses Joshua takes as a Theology major simply because those classmates have not declared a major in theology. Washington's policy is so arbitrary that achieves no purpose relating to the administration of the Promise Scholarship except targeting–and penalizing–those students who actually declare a major in Theology.[3]

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[3] For good reason the State has not attempted to justify its targeting of Theology majors as designed to ensure that public funds do not go to individuals who intend to become clergy or religious because any effort to identify and disqualify students based on their declared majors would be just as arbitrary as the state's current scheme. This case provides a perfect example.

Washington's arbitrary targeting of students declaring certain Theology majors, and its arbitrary preference for students declaring majors deemed acceptable by the State, is precisely the sort of arbitrary and status-based classification system that cannot satisfy the requirements of Equal Protection under even the most deferential standard of review. This Court has repeatedly invalidated classifications designed to benefit certain citizens based on arbitrary preferences. *See, e.g., Zobel v. Williams*, 457 U.S. 55 (1982)(Program distributing revenue dividends to residents based on duration of residency violated equal protection because goal of classification was to provide greater benefit to those who had resided longer in the State.); *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989)(Assessment practice which effectively limited meaningful valuation adjustments to transfer of property thereby creating arbitrary disparities in tax burdens violated equal protection); *Williams v. Vermont*, 472 U.S. 14 (1985)(Regulation that allowed Vermont residents registering vehicle to reduce use tax by a credit in amount of use or sales tax paid to another state if person was Vermont resident at time of vehicle was purchased but denying credit to Vermont residents if they were not Vermont residents at time vehicle was purchased created an arbitrary classification that violated due process); *Hooper v. Bernalillo County*, 472 U.S. 612 (1985)(Statute granting tax exemption to Vietnam veterans who resided in the state before May 8, 1976 violated equal protection

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Joshua Davey believed he was called to ministry as a freshman in college; but he is currently enrolled in Harvard Law School; who can tell where he will believe he is called to serve God as a result of continued prayer and reflection? Information relating to Davey's enrollment can be found at www.aclj.org/jsl/030519daveytranscript.asp

because it was plainly designed to favor residents before that date over newcomers).

This well established line of cases prevents Washington from using arbitrary and status-based preferences to benefit a class of citizens based on generalized notions concerning contributions to the community etc. Washington's policy is plainly based on just this sort of arbitrary preference presuming that declared Theology majors are somehow less likely to contribute to the common good than students declaring other majors. But, as demonstrated above, Washington's policy has nothing to do with the actual use of Promise Scholarship funds. Quite the contrary Washington's policy governing use of Promise Scholarship funds makes eligibility turn on a purely formal inquiry regarding "declared" major that achieves nothing but a status-based exclusion from the Scholarship program heaped on certain students who wish to study a discipline taught from a religious viewpoint deemed anathema by Washington.

It is telling that Washington employs the most hollow formalism in an effort to defend its policy. Washington indicates in its briefing that Davey could have enrolled in two colleges or that he should not have declared his major until his Junior year so that he could avoid the plainly absurd (and unjust) result produced by the State's policy. Fortunately, Davey need not resort to such subterfuge because Washington's policy turns on the very sort of arbitrary classifications and preferences that violate even the lowest level of protection provided by the Equal Protection clause. For this reason alone, the Ninth Circuit's decision should be affirmed.

II. Washington's Policy Stripping Students Of Their Promise Scholarship If They Chose To Major In Theology Courses Deemed Anathema By The State Is Void Because It Makes Eligibility For The Promise Scholarship Turn On An Unconstitutional Condition.

As demonstrated above, Washington's policy makes eligibility for Promise Scholarships turn on purely arbitrary factors that have nothing to do with the actual use of scholarship funds. Indeed, Washington's policy makes eligibility for a Promise Scholarship turn on an unconstitutional condition precisely because the State's policy turns on arbitrary factors wholly unrelated to the actual use of scholarship funds. Although Washington concedes that it has no right to prevent Joshua Davey from using his own money to pay for theology courses taught from a religious perspective, *see* Pet. Br. at p. 25, its policy does just that; for Joshua must forfeit his scholarship even if he uses personal funds to pay for such courses. Seen in this light it is evident that Washington's policy creates an illicit *quid pro quo* that requires Davey to relinquish his fundamental rights to Free Speech, Association, and the Free Exercise of religion in order to remain eligible for his Promise Scholarship.

This Court has repeatedly rejected policies which create an illicit quid pro quo, forcing citizens to relinquish fundamental rights in exchange for a government benefit. Washington's policy plainly fails this test. Joshua must renounce his efforts to pursue his vocation *via* training in Theology if he wishes to receive his Promise Scholarship. By the same token, Joshua must renounce his right to speech and association if he

wishes to enjoy the Promise Scholarship. Thus Washington's policy makes continued eligibility for a Promise Scholarship turn on wether students like Davey will forgo the exercise of their rights to Free Speech, Freedom of Association and the Free Exercise of Religion.

It is fundamental that the State cannot penalize its citizens for the free exercise of religion by conditioning eligibility for government programs on conduct that burdens religious exercise for a simple reason. As this Court stated long ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege" and, as a result, "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963)(Requirement that plaintiff accept job requiring work on Sabbath contrary to plaintiff's religious conviction in order to be eligible for unemployment benefits was an unconstitutional burden on Free Exercise of religion because it forced plaintiff to choose between exercise of religious conviction and public benefit) (*citations and quotations omitted*); *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972)(Application of compulsory secondary education requirement to Old Order Amish violated Free Exercise clause given religious belief preventing compliance with requirement and importance of parental right to supervise education of children); *Thomas v. Review Board*, 450 U.S. 707 (1981)(rule making plaintiff ineligible for unemployment compensation because he quit job which entailed making armaments pursuant to his religious conviction violated Free Exercise because it conditioned receipt of benefits on violation of religious belief); *Hobbie v.*

Unemployment Appeals Comm, 480 U.S. 136 (1987)(rule disqualifying woman fired for refusal to work on Sabbath from eligibility for unemployment benefits infringed her right to Free Exercise of religion). These cases make it clear that Washington's policy violates Davey's Free Exercise rights.

Likewise, this Court has consistently voided efforts to condition eligibility for access to government benefits on the waiver of fundamental rights to speech and association. Thus for example, in *Rutan v. Republican Party of Illinios*, 497 U.S. 62 (1990), the Supreme Court struck down an governor's executive order designed to ensure that hiring, rehiring, transfer, and promotion was limited to employees with connections to the Republican Party, specifically rejecting the assertion that conditioning employment decisions on political association was permissible because no employee had a right to the benefits at issue. The Court wrote:

> For at least a quarter-century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government many not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in freedom of speech. For if the government could deny a benefit to a person because of nis constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would

> allow the government to produce a result which it could not command directly.

Rutan, 497 U.S. at 72 (internal quotation, brackets, and citations omitted); *see also Perry v. Sinderman*, 408 U.S. 593, 598 (1972) (may not condition public employment opportunities on waiver of First Amendment rights); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (withholding passport of Communist Party member violated freedom of association); *Speiser v. Randall*, 357 U.S. 513 (1958) (tax exemption conditioned on applicant's pledge not to advocate forcible overthrow of government was unconstitutional).

This convergence of controlling law under the Free Exercise and Free Speech provisions permits only one result in this case: Washington cannot require Joshua Davey to relinquish his fundamental rights as a condition for eligibility for a Promise Scholarship made available to all students so they can pursue their privately chosen course of study. Washington seeks to do just that by reason of its policy barring declared Theology majors from Promise Scholarships if they receive instruction *via* courses taught from a religious perspective. For this reason alone, the Ninth Circuit's decision should be affirmed.

CONCLUSION

Washington's policy stripping students of Promise Scholarship funds if they declare a major in Theology and receive instruction *via* courses deemed to be insufficiently secular by the State cannot withstand even the most deferential standard of review, never mind the strict scrutiny that governs in this case. Washington's policy employs an arbitrary, capricious,

and irrebuttable presumption that strips certain students of their scholarship based on a perverse and irrebuttable presumption that Promise Scholarship funds will be improperly used by students who declare a major in Theology. Similarly, the result of Washington's policy is to create a wholly arbitrary and status-based classification system that has no meaningful relationship with the actual use of Promise Scholarship funds but does burden or benefit students eligible for Promise Scholarships based on nothing more than their decision to declare a Theology major. And precisely because Washington's administration of its Promise Scholarship turns on arbitrary factors having nothing to do with the actual use of scholarship funds it is evident that the effect of Washington's policy is to make continued eligibility for Promise Scholarships turn on an unconstitutional condition, requiring students like Joshua to forgo exercise of their fundamental rights to Free Speech, Association, and the Free Exercise of Religion in order to remain eligible for that benefit. For all these reasons Washington's policy violates the First and Fourteenth Amendments to the United States Constitution and, as a result, the Ninth Circuit's decision voiding Washington's policy should be affirmed.

Respectfully submitted,

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